



California Fair Political Practices Commission

June 26, 1990

Honorable Rod Anaforian
Councilmember
City of Fresno
City Hall
Fresno, CA 93721

Re: Your Request for Informal Assistance
Our File No. I-90-312

Dear Councilmember Anaforian:

This is in response to your letter requesting assistance regarding your responsibilities as a Fresno City Councilmember under the conflict-of-interest provisions of the Political Reform Act (the "Act").^{1/} Since your advice request seeks general guidance with respect to potential conflicts of interest, we are treating your request as one for informal assistance.^{2/}

QUESTION

As territory sales representative for Organon Pharmaceuticals and Fresno City Councilmember, may you participate in decisions concerning the redesigning of the street pattern adjacent to St. Agnes Hospital which is a client of Organon Pharmaceuticals?

CONCLUSION

Because Organon Pharmaceuticals and all the clients of Organon Pharmaceuticals which have purchased pharmaceuticals through you, are responsible for your income, you may not participate in any governmental decision which will have a

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

^{2/} Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

reasonably foreseeable, material financial effect on the sources of income.

FACTS

As a Fresno City Councilmember and an employee of Organon Pharmaceuticals (hereafter, "Organon"), you have become concerned about the potential for conflicts of interest with respect to your employer. You stated that you are specifically concerned about an upcoming decision concerning the redesigning of the surface street pattern adjacent to St. Agnes Hospital ("St. Agnes") which has been a client of Organon through you.

As territory sales representative and district trainer for Organon, your job is to increase demand for the product line distributed by Organon. In furtherance of this goal, you make sales calls and provide support services to anesthesiologists and anesthesiologists who might use Organon's products.

You stated that you receive three types of compensation. First, you receive an annual fixed salary from Organon. Second, in addition to salary, you receive a nominal quarterly stipend in compensation for your services as the district trainer. Finally, you also receive a quarterly bonus contingent on the overall volume of your sales of Organon products. In 1990, you estimate that you will receive \$15,000-\$20,000 in bonus.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or otherwise using his official position to influence a governmental decision in which the official has a financial interest. A "public official" is defined in Section 82048 to include every member, officer, employee or public official of a state or local government agency. As a member of the Fresno City Council, you are a "public official" as defined in the Act. (Section 82048.) Thus, you may not use your official position to make or participate in making a governmental decision in which you know or have reason to know you have a financial interest.

Economic Interests

Section 87103 specifies that a public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on the official or a member of his or her immediate family or on:

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars

(\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

Section 87103(c) and (d).

According to Section 87103, any person or business that has made any payment to you is a source of income to you. If, in the aggregate, the payment was for \$250 or more in the past 12 months, the source is a potentially disqualifying financial interest for the purposes of Section 87103.

You stated in your letter that you receive a salary solely from your employer, Organon. Thus, Organon is the source of your salary, and consequently, an economic interest. In addition, as an employee of Organon, you have another independent grounds for Organon being regarded as an economic interest of yours. Thus, you are required to disqualify yourself from any decision of the city council which could foreseeably have a material financial effect on Organon, distinguishable from the effect on the public generally. (Section 87103(c).)

You also stated that you receive bonuses from Organon, based on the volume of your sales per quarter. Generally, where commission income is received as a result of a transaction, Regulation 18704.3 (copy enclosed) controls who will be treated as the source of the income.^{3/} However, "commission income" is defined in Regulation 18704.3(b) to include only "gross payments received as a result of services rendered as a broker, agent, or other salesperson for a specific sale or similar transaction." Consequently, Regulation 18704.3 does not control where a bonus is provided based on the volume of sales as contrasted with a payment received as a commission for a "specific sale or similar transaction."

^{3/} For example, Regulation 18704.3 provides that the sources of commission income in a specific sale or similar transaction for a real estate agent include: (A) The broker and brokerage business entity under whose auspices the agent works; (B) The person the agent represents in the transaction; and (C) Any person who receives a finder's or other referral fee for referring a party to the transaction to the broker, or who makes a referral pursuant to a contract with the broker. Further, Regulation 18704.3(d) provides that for purposes of determining whether disqualification is required under the provisions of Sections 87100 and 87103(c), the full gross value of any commission income for a specific sale or similar transaction shall be attributed to each source of income in that sale or transaction.

However, in the Larsen Advice Letter (No. I-89-555, copy enclosed) the Commission addressed a similar factual scenario. In Larsen a Sutter County Supervisor's spouse was employed by an agricultural products processing company. The supervisor's spouse was compensated by a fixed salary, and bonuses based on the volume of processing. The company's clients were primarily local farmers. In that letter we concluded that the farmers themselves were the source of the income to the supervisor. This conclusion was based on the fact that the bonuses were akin to commission payments.

In the present case, the bonuses which are paid to the supervisor's spouse are based on the amount of produce processed by the plant which he manages. The bonus payment is made to the spouse automatically, as in the case of a real estate commission automatically paid to an agent. Thus, the automatic bonus which is "owed" to the spouse for the volume of production is similar to the commission arrangement discussed in Carey.^{4/}

Further, you have been able to provide to us figures which demonstrate that it is possible to identify the amount of the bonus payment attributable to each Sutter County farmer doing business with the employer. This indicates that Supervisor LeVake's spouse knows which Sutter County farmers are responsible for the bonuses provided to him by his employer. Moreover, absent contrary information, these farmers appear to have control over whether or not the spouse receives the bonus income attributable to their produce. The farmers could choose to do just enough business with the processor to eliminate the bonus, or in the alternative, could increase their business with the processor to significantly enhance the bonuses received by the spouse.

(Footnote added.)

According to your facts Organon's bonus system is substantially similar to the bonus system addressed in the Larsen Advice Letter. Organon's bonuses are paid to you based on the your total sales. The bonus payment is automatic if your sales reach the designated thresholds. Consequently, under Organon's bonus system, the buyers appear to be able to control the bonus income you receive.

However, under your facts, no specific purchasers can be identified as responsible for the bonuses provided to you. Since

^{4/} In re Carey (1977) 3 FPPC Ops. 99, copy enclosed.

your bonus is based on the total volume of your sales, all your clients are equally responsible for the bonuses. The first purchaser in the quarter is equally as important as the purchaser that actually puts you over the quota entitling you to the bonus. Thus, we would conclude that all the purchasers responsible for the bonus are sources of their pro-rata share of the bonus. For example, if the sale of 100 items entitles you to a \$100 bonus, and hospital A buys 10 items, and hospital B buys 90 items, hospital A is a source of income to you of \$10, and hospital B is a source of income to you of \$90.^{5/}

However, having an economic interest in the clients of your employer does not require disqualification in every case. For an economic interest to require disqualification with respect to a specific governmental decision, the decision must also have a foreseeable and material financial effect on the economic interest.

Foreseeability

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable. (In re Thorner (1975) 1 FPPC Ops. 198, copy enclosed.)

Assuming that St. Agnes has been a source of income to you of \$250 or more in the past 12 months, the decision concerning the street pattern around the hospital and possibly accessibility to the hospital could foreseeably result in some financial impact on the hospital. However, in addition to the financial effect being foreseeable, the effect must also be material to require disqualification.

Regulation 18702.1 (copy enclosed) provides that the effect of a governmental decision is material if a business entity in which a public official has an economic interest is directly involved in the decision before the public official's agency. A source of income is directly involved in a decision before the city council if the source or their agent:

- (1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

^{5/} Of course this example is an oversimplification of the calculations required to determine the exact percentage of the bonus attributable to each client.

(2) Is a named party in, or the subject of, the proceeding concerning the decision before the official or the official's agency;

(3) A person or business entity is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person or business entity.

Regulation 18702.1(b).

Applying this regulation to your facts, it appears that St. Agnes is not directly involved in the street decisions of the Fresno City Council that you referred to in your letter.

However, public officials subject to the conflict-of-interest provisions of the Act are also required to disqualify themselves from participation in governmental decisions which indirectly have a material financial effect on a business entity that is an economic interest of the public official. Whether the indirect effect of an decision is material depends on the financial size of the business entity. Regulation 18702.2 (copy enclosed) provides that for a relatively small business entity,^{6/} the effect of a decision is material where:

(1) The decision will result in an increase or decrease in the gross revenues for a fiscal year of \$10,000 or more; or

(2) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$2,500 or more; or

(3) The decision will result in the increase or decrease in the value of assets or liabilities of \$10,000 or more.

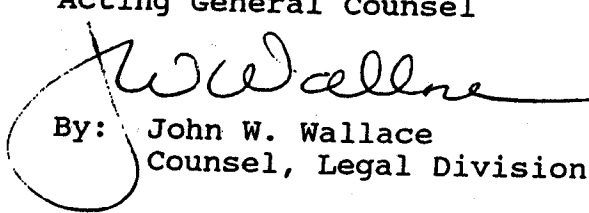
^{6/} This assumes that because of St. Agnes' financial size, subdivision (g) of Regulation 18702.2 applies to determine whether the effect of a decision is material. If subdivision (g) is not applicable the appropriate subdivision in Regulation 18702.2 should be used to determine whether the effect of a decision is material. If a hospital is a non profit entity, the materiality of indirect effects is governed by Regulation 18702.5 (copy enclosed).

Thus, you may not participate in the street decision if the decision could foreseeably increase or decrease the gross revenues, assets or liabilities of St. Agnes by \$10,000 or more, or increase or decrease expenses by \$2,500.

If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5901.

Sincerely,

Scott Hallabrin
Acting General Counsel


By: John W. Wallace
Counsel, Legal Division

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Enclosures